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Brooklyn Institute of Arts and Sciences v. City of New York: Mayor of New York Violates First Amendment Right to Experience Sensation

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CASE NOTES AND COMMENTS

***BROOKLYN INSTITUTE OF ARTS AND SCIENCES* v. *CITY OF NEW YORK*: MAYOR OF NEW YORK VIOLATES FIRST AMENDMENT RIGHT TO EXPERIENCE SENSATION**

I. INTRODUCTION

November 1, 1999 ushered in another victory for First Amendment advocates. The District Court of the Eastern District of New York granted a preliminary injunction to bar the City of New York, Mayor Giuliani and all those acting in concert with them from inflicting any punishment, retaliation, discrimination, or sanction of any kind against the Brooklyn Institute of Arts and Sciences ("Institute") or its Board of Trustees for displaying the Exhibit "Sensation: Young British Artists from the Saatchi Collection ("Exhibit" or "Exhibition") at the Brooklyn Museum ("Museum").¹ Particularly outraged by "The Holy Virgin Mary," a collage of pornographic photos adorned with elephant dung, Mayor Rudolph E. Giuliani took aim at the Brooklyn Museum and suspended city funding from the Museum unless it canceled the highly controversial and sexually explicit show of British artists.² The Mayor deemed the Exhibit "sick and disgusting" and insisted that taxpayer dollars should not support this show.³

The Museum had no plans to pull the Exhibit and fired back with a federal suit alleging that Giuliani and the City infringed on its First Amendment rights of free expression.⁴ The Museum Board hoped to convince Giuliani of the show's artistic merit and of its need to be seen in New York City.⁵ Giuliani was persuaded otherwise and he and the City brought an action in state court to

1 Brooklyn Institute of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184, 185 (E.D.N.Y. 1999).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Brooklyn Institute*, 64 F. Supp. 2d at 185.

evict the Museum from the city-owned building unless the Museum board canceled the Exhibit.⁶

This case note will examine the District Court's decision in *Brooklyn Institute of Arts and Sciences v. The City of New York*. Part I discussed First Amendment precedent as it pertains to the issues in the case. According to the Supreme Court of the United States, the government may not deny a benefit if the reason for doing so would require a choice between exercising First Amendment rights and obtaining the benefit.⁷ Part II discusses the facts of the case at bar and summarizes the District Court's opinion. In Part III analyzes *Cuban Museum of Arts and Sciences v. City of Miami*⁸ and *National Endowment of the Arts v. Finley*,⁹ the two major cases relied on by the court in reaching its holding. The Note concludes that the decision of the District Court was correct in light of First Amendment precedent.

I. BACKGROUND

A. History and Purpose of the First Amendment

The First Amendment of the Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹⁰ In *Texas v. Johnson*,¹¹ the Supreme Court held that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

⁶ *Id.*

⁷ See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

⁸ 766 F. Supp. 1121 (S.D. Fla. 1991).

⁹ 524 U.S. 569 (1998).

¹⁰ U.S. CONST. amend. I.

¹¹ 491 U.S. 397 (1989).

disagreeable.”¹² In *Johnson*, several witnesses were offended when the defendant burned an American flag outside the 1984 Republican National Convention in Dallas.¹³ Johnson was charged with violating the Texas desecration statute.¹⁴ Because Johnson was prosecuted only because of the content of the particular message he was conveying, the Court held the Texas statute violated the First Amendment as applied to Johnson’s conduct.¹⁵ In keeping with the principle underlying the First Amendment, government officials are barred from censoring works said to be “offensive,”¹⁶ “sacrilegious,”¹⁷ and “morally improper.”¹⁸ The Court does not distinguish between direct or indirect censorship of expression,¹⁹ nor does it allow the government to discourage free speech from its own employees and contractors.²⁰

12 *Texas v. Johnson*, 491 U.S. at 414.

13 *Id.* at 397.

14 *Id.* The Texas statute at issue made it a crime to “intentionally or knowingly desecrate...a state or national flag.” “Desecrate” was defined to mean “deface, damage, or otherwise physically mistreat[s] in a way that [he] knows will seriously offend one or more persons likely to observe or discover his action.” *Id.* at 435.

15 *Id.* at 435 n.2. See *Cohen v. California*, 403 U.S. 15, 18 (1971) (Supreme Court reversed conviction of defendant for offensive conduct as a result of wearing a jacket with the words “Fuck the Draft” into a courthouse). See *What constitutes a violation of flag desecration statutes*, 41 A.L.R. 3d 502 (1972) (giving a detailed analysis of *Cohen*).

16 *Id.*

17 *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 531 (1952). See *Kunz v. People of State of New York*, 340 U.S. 290 (1951) (Supreme Court held ordinance making it unlawful to hold public worship meetings on the streets without first obtaining a permit from the city police commissioner was invalid as vesting restraining control over the right to speak on religious subjects). See also, *Freedom From Prior Restraints and Censorship*, 16A Am.Jur. 2d, Const. L., § 454 (1998).

18 *Hannegan v. Esquire*, 327 U.S. 146, 149 (1946). See *Kingsley Intern. Pictures Corp. v. Regents of University of State of New York*, 360 U.S. 684, 688 (1959) (holding a New York statute unconstitutional because it prevented the exhibition of a motion picture that advocates an idea; also holding adultery under certain circumstances may be proper behavior).

19 *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

20 *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Prior to *Johnson*, the Court addressed First Amendment challenges regarding religion and morality. Concerning alleged “sacrilegious” content, the Supreme Court in *Joseph Burstyn, Inc. v. Wilson*, found a New York statute which authorized the denial of a license to motion pictures found to be “sacrilegious” to be in violation of the First Amendment.²¹ The Court noted that from a freedom of expression standpoint, it is not the business of the government to suppress real or imagined attacks on a particular religion, whether it appears in publications, speeches, or motion pictures.²² It noted that the state has no legitimate interest in protecting any or all religions from views distasteful to them sufficient to justify prior restraints of those views.²³

Further, in *Hannegan v. Esquire*, the Court held the Postmaster General could not deny second-class postal privileges to a magazine that he perceived to be immoral.²⁴ Justice Douglas stated: “To withdraw the second-class rate from this publication today because its contents seemed to [one] official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates.”²⁵

The laws that underlie the First Amendment determine that government cannot suppress ideas indirectly any more than it can do so directly.²⁶ In *Speiser v. Randall*, the California legislature enacted a statute requiring anyone who sought to take advantage of a property tax exemption to sign a declaration stating that he did not advocate the forcible overthrow of the government.²⁷ The Supreme Court stated that “[to] deny an exemption to claimants [of

²¹ 343 U.S. 495, 531 (1952).

²² *Id.* at 505.

²³ *Id.*

²⁴ 327 U.S. 146, 151 (1946).

²⁵ *Id.* at 158.

²⁶ *Brooklyn Inst. of Arts and Sciences*, 64 F. Supp. 2d. at 198.

²⁷ 357 U.S. 513, 518 (1958).

property tax exemptions] who engage in certain forms of speech is in effect to penalize them for such speech.”²⁸

Similarly, the Court has held the First Amendment protects government employees and those who have independent contracts with the government from termination based solely on speech found offensive to the government.²⁹ In *Perry v. Snidermann*, the Supreme Court held that a professor at a state college who had publicly criticized the policies of the college administration could not be denied renewal of his contract, even though he lacked any contractual or tenure right to re-employment.³⁰

For at least a quarter-century, this Court has made clear that even though a person has no “right” to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes

²⁸ *Speiser*, 357 U.S. at 518.

²⁹ Bd. Of County Comm’r. v. Umbehr, 518 U.S. 668 (1996).

³⁰ 408 U.S. 593 (1972). Lack of contractual or tenure right to re-employment taken alone, did not defeat the professor’s claim that the nonrenewal of his contract violated his free speech right under the First and Fourteenth Amendment. *Id.* at 598. The Court further stated that the professor was entitled to an opportunity to prove the legitimacy of his claim of entitlement to protection by procedural due process arising from his allegation that the college had a de facto tenure policy. He claimed that he and others relied upon an unusual provision in the college’s Faculty Guide: “Teacher Tenure: Odessa College has no tenure system. The Administration of the college wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.” *Id.* at 600. See *Board of Regents v. Roth*, 408 U.S. 564 (1972). The Supreme Court held the Constitution does not require a hearing before the nonrenewal of a nontenured teacher’s contract, unless he can show that he was deprived of an interest in liberty or that he had a property interest in continued employment, despite the lack of tenure or formal contract. A person’s interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit that he may invoke at a hearing. *Id.* at 577.

his constitutionally protected interests--especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited . . . Such interference with constitutional rights is impermissible.³¹

In many different contexts, the Supreme Court has made clear that the government may not deny various kinds of benefits, although it is under no obligation to provide them, if the reason for denial would require a choice between exercising First Amendment rights and obtaining the benefit.³² It may not “discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas”³³ These ideas are still highly valued today, as evidenced by the United States District Court for the Eastern District of New York’s decision in *The Brooklyn Institute*.

³¹ *Perry*, 408 U.S. at 597.

³² *Brooklyn Institute*, 64 F. Supp. 2d at 199. Compare *Rust v. Sullivan*, 500 U.S. 173 (1991). In *Rust*, regulations of the Department of Health and Human Services prohibiting recipients of funds under Title X of the Public Health Service Act from engaging in abortion counseling, referral and the provision of information regarding abortion as a method of family planning were not found to violate the First Amendment free speech rights of recipients, their staffs or their patients by impermissibly imposing viewpoint-discriminatory conditions on government subsidies. In issuing regulations, the court held the government did not discriminate on the basis of viewpoint; it merely chose to fund one activity to the exclusion of another. Moreover, regulations simply ensured appropriated funds were not used for activities, including speech, that are outside the scope of the federal program. *Id.* at 174.

³³ *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983).

II. SUBJECT OPINION: *BROOKLYN INSTITUTE OF ARTS AND SCIENCES v. CITY OF NEW YORK*

A. Facts

In 1890, the New York Legislature established the Brooklyn Institute of Arts and Sciences to create museums and libraries of arts and science.³⁴ This Act, formally incorporating the Institute, designated fifty private individuals as the trustees of the Institute to adopt its own constitution, by-laws and all appropriate rules and regulations for its self-governance.³⁵

The City of Brooklyn and the Institute entered into a lease agreement (“Lease”) in December 1893, which established a leasehold interest in a certain plot of land for a term of one hundred years.³⁶ The building occupied by the Brooklyn Museum was leased to the Institute in February 1897 by contract (“Contract”) for a term coextensive with the Lease, to house the Institute’s collections.³⁷ Upon the expiration of the original term of the Lease, in December 1993, the Museum remained a tenant in possession of

³⁴ *Brooklyn Institute*, 64 F. Supp. 2d at 184.

³⁵ *Id.* The 1890 Act provides:

Section 2. The purposes of said corporation shall be the establishment and maintenance of museums and libraries of art and science, the encouragement of the study of the arts and science and their application to the practical wants of man, and the advancement of knowledge in science and art, and in general to provide the means for popular instruction and enjoyment through its collections, libraries and lectures.

Section 3. The museums and libraries of said corporation shall be open and free to the public and private schools of said city, at all reasonable times, and open to the general public on such terms of admission as shall be approved by the mayor and park commission of said city.”

Id. at 187.

³⁶ *Id.* The Lease provides that “if and when such museum...shall cease to be maintained according to the true intent and meaning of said act, and of this lease, then this lease shall be forfeited, and the said lands, and buildings thereon erected shall revert to the City of Brooklyn. *Id.* at 187-88.

³⁷ *Brooklyn Institute*, F. Supp. 2d at 187.

the land and building on the same terms and conditions contained in the Lease and Contract.³⁸

The Contract provided that the City pay a yearly sum to the Institute for the maintenance of the Museum.³⁹ City funds generally “are not used for direct curatorial or artistic services.”⁴⁰ The City’s Fiscal Year 2000 appropriation of \$5.7 million to the Museum was to contribute to its “maintenance, security, administration, curatorial, educational services and energy costs.”⁴¹

The Museum claimed to be the second largest art collection in the United States, with approximately one and a half million objects.⁴² In addition to displaying works from its permanent collection, the Museum regularly displays temporary exhibits to

38 *Id.* The Contract provides that:

[t]he Brooklyn Institute of Arts and Sciences...shall place on exhibition in said Museum Building collections of paintings and other works of art and collections and books representing or illustrating each and all of the Departments of the arts and sciences named in the constitution of said Institute, and shall cause to be properly arranged, labelled [sic] and catalogued all such collections and books as may be open to public exhibition or for public use, for the instruction and benefit of the residents of Brooklyn or the general public.

Id. at 188.

It also provides that any of the collections of the Museum “shall continue to be and shall remain absolutely the property of the [Institute], and that neither the [Mayor nor the City of Brooklyn] by reason of said property being placed in said building or continuance therein, have any title, property or interest therein.”

Id.

39 *Id.* at 189. The Contract specifically defines “maintenance” to include: “(1) repairs and alterations; (2) fuel; (3) waste removal; (4) wages of employees providing essential maintenance, custodial, security and other basic services; (5) cleaning and general care; (6) tools and supplies; and (7) insurance for the building, furniture and fixtures.” *Id.* Therefore, it reiterates that City funds are not being used to fund the Exhibit.

40 *Id.* The City also approves certain capital expenditures “to protect and ensure the continued existence of New York City’s most precious assets, its cultural institutions, for local communities, the general public and the artistic community.” *Brooklyn Institute*, F. Supp. 2d at 187.

41 *Id.*

42 *Id.* The largest collection belongs to the Metropolitan Museum of Art in Manhattan.

the public.⁴³ The temporary exhibit at issue was “Sensation: Young British Artists from the Saatchi Collection.” This controversial exhibition included ninety paintings, sculptures, photographs and installations by forty-two contemporary British artists.⁴⁴ Unlike most Museum exhibits, the show was drawn entirely from one private collection, that of Charles Saatchi.⁴⁵ The themes explored in the works were varied and include “contemporary and pop culture, identity politics, feminism, cultural diversity and racism, mortality, memory, class, and social criticism.”⁴⁶ The artists contributing to the Exhibition were recognized by the artistic community for their significant artistic contributions,⁴⁷ with works comprising a rotting cow’s head and shark preserved in formaldehyde and a sculptural bust made of frozen human blood.⁴⁸ On one wall, a photograph, magnified to hundreds of times its actual size, depicted blood seeping from a bullet wound in an unnamed victim’s head.⁴⁹

The Exhibit was first displayed at the Royal Academy of Arts in London in 1997 and drew the highest attendance of any contemporary art exhibition in London for the last fifty years.⁵⁰ The Exhibition was highly controversial, drawing both praise and

43 *Id.*

44 *Brooklyn Institute*, 64 F. Supp. 2d at 189. Sensation is not the first controversial exhibit the museum has mounted. Past exhibits include “The Play of the Unmentionable: The Brooklyn Museum Collection,” and “Too Shocking to Show,” both of which were art and performance exhibits in 1990 and 1991. *Id.*

45 *A Shock Grows in Brooklyn: A fiery controversy over a museum’s new show brings New York City’s mayor out slugging (“Sensation: Young British Artists From the Saatchi Collection” exhibition)*, NEWSWEEK, Oct. 11, 1999.

46 *Id.*

47 *Brooklyn Institute*, 64 F. Supp. 2d at 190. Three of the artists featured, Damien Hirst, Chris Ofili and Rachel Whiteread, have been awarded the prestigious Turner Award, an annual prize awarded to a British artist under the age of fifty for the most outstanding exhibition or art work of the year.

48 Paula Span, *New York Art Show in a Heap of Controversy; Mayor Rudolph Giuliani Threatens to Cut Off Museum’s Funds Over Dung-Encrusted Icon*, WASH. POST, Sept. 24, 1999.

49 Ariella Budick, *A REVIEW/Provocative, Gross And Worth Seeing*, NEWSDAY, Sept. 28, 1999.

50 *Brooklyn Institute*, 64 F. Supp. 2d at 189.

criticism.⁵¹ After seeing the Exhibition at the Royal Academy, Arnold Lehman, Director of the Brooklyn Museum, negotiated to bring *Sensation* to Brooklyn to the Museum from October 2, 1999 through January 9, 2000.⁵²

The Exhibit was scheduled to open on October 2, 1999.⁵³ City officials, one week before its scheduled opening, began raising objections to the Exhibit.⁵⁴ On September 22nd, Commissioner Chapin, stating he was acting on behalf of the Mayor, advised Lehman that the City would terminate all funding to the Museum unless it canceled the Exhibit.⁵⁵ Mayor Giuliani was particularly outraged by the “Holy Virgin Mary,” a work by Chris Ofili, whose trademark is the use of elephant dung.⁵⁶ Giuliani, a Roman Catholic, described the Exhibit as “sick” and “disgusting” and an affront to religion that should not receive taxpayer funding.⁵⁷ The Mayor declared that he would cut City funding “until the Director comes to his senses and realizes that if you are a government-subsidized enterprise, then you can’t do things that desecrate the most personal and deeply held views of people in society.”⁵⁸ Giuliani stated that “[i]f someone wants to do that privately and pay for it privately, that’s what the First Amendment is all about . . . But to have the government subsidize something like that is outrageous.”⁵⁹ These threats to cut funding are severe considering that the City of New York provides almost a third of the Brooklyn

⁵¹ *Id.*

⁵² *Id.* After being shown in Brooklyn, the Exhibit is scheduled to be shown at the National Gallery of Australia and the Toyota City Museum outside of Tokyo. *Id.*

⁵³ *Id.* at 190.

⁵⁴ *Brooklyn Institute*, 64 F. Supp.2d at 190.

⁵⁵ *Id.*

⁵⁶ *Id.* at 191. In addition, on the painting entitled “The Holy Virgin Mary,” there is a collage of small photographs of buttocks and female genitalia adorned with elephant dung. *Id.*

⁵⁷ *Id.* at 186.

⁵⁸ *Brooklyn Institute*, 64 F. Supp. 2d at 190.

⁵⁹ *Id.* The Mayor also referred to Damien Hirst’s work of two pigs in formaldehyde as “sick stuff” to be exhibited in an art museum. *Id.* at 191.

Museum's twenty-three million dollar annual operating budget.⁶⁰ Mayor Giuliani announced that the Museum would lose \$7.2 million if the Exhibit remained on the calendar.⁶¹

The following day, Giuliani accused the Museum of violating the Lease by mounting an exhibit that was inaccessible to schoolchildren and by failing to obtain his permission to limit access to the Exhibit.⁶² The Mayor and other City officials escalated their attacks on the Exhibit and the Museum, vowing to cut off all funding, including construction funding, to seek to replace the Board of Trustees, to cancel the Lease, and to assume possession of the Museum building, unless the Exhibit was canceled.⁶³

The Museum responded to the City's threats to stop its monthly payment of \$497,554, due on October 1, 1999, with a federal lawsuit charging Giuliani's attempt to withhold funding unconstitutional.⁶⁴ Lehman staunchly defended Ofili's work, saying that animal dung is venerated in many African cultures:⁶⁵ "What they tell us is not a story of blasphemy, but of reverence, but it is in a language that is foreign to many of us raised in the tradition of Western culture. Having these sacred objects in our museums teach us lessons of tolerance, understanding and

60 *A Shock Grows in Brooklyn: A fire controversy over a museum's new show brings New York's mayor out slugging*. ("Sensation: Young British Artists from the Saatchi Collection" exhibition), NEWSWEEK, Oct. 11, 1999.

61 *Id.*

62 *Brooklyn Institute*, 64 F. Supp. 2d at 191. Giuliani made clear that he would not give his permission to restrict access to the Exhibit because of his view that "taxpayer-funded property should not be used to 'desecrate religion' or 'do things that are disgusting with regard to animals.'" A letter from New York City Corporation Counsel, Michael D. Hess, to Lehman, dated September 23, 1999, stated that "[t]he Mayor will not approve a modification of the Contract to allow [the Museum] to restrict admission to the museum. In light of the fact that [the Museum] has already determined that it would be inappropriate for those under 17 years of age to be admitted to the exhibit without adult supervision (a determination with which the City does not disagree), [the Museum] cannot proceed with the exhibit as planned." *Id.*

63 *Id.*

64 *Id.*

65 Michael Kimmelman, "Sensation" At Brooklyn Museum: After All That Yelling, *Time To Think*, N.Y. TIMES NEWS SERVICE, Oct., 1, 1999.

diversity.”⁶⁶ Lehman stated that “[p]ublic funding of the arts is an investment in the values and ideals embodied in the First Amendment of the United States Constitution.”⁶⁷ Floyd Abrams, the Museum’s lawyer and a First Amendment expert, said that governments have no obligation to fund the arts, but once they decide to do so, they cannot choose which artistic viewpoints it is going to support.⁶⁸

Meanwhile, on September 30, 1999, the City of New York brought action in state court to evict the Museum from the City-owned building.⁶⁹ The battle between the Brooklyn Museum, Giuliani and the City of New York charged several community interest groups to respond. The Cultural Institutions Group, thirty-three city-funded organizations from the Bronx Zoo to the New York City Ballet, issued a public statement expressing concern.⁷⁰ The Catholic League for Religious and Civil Rights urged Catholics to boycott the Museum.⁷¹ The New York Civil Liberties Union and other interested parties filed amicus briefs in support of the Brooklyn Museum.⁷²

Contrary to Museum officials’ forecasts of financial disaster, the Sensation Exhibit has considerably enhanced the Museum’s financial health.⁷³ The Museum has enjoyed record attendance for the Exhibit; long lines of visitors forced Museum officials to open

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Ron Grossman, *Rudy’s Right To Draw The Line*, CHICAGO TRIBUNE, Oct. 3, 1999.

⁶⁹ *Brooklyn Institute*, 64 F. Supp. 2d at 191.

⁷⁰ Paula Span, *Museum Draws Crowds as Battle Over Art Exhibit Intensifies*, WASH. POST, Oct. 3, 1999 at A02.

⁷¹ Paula Span, *New York Art Show in a Heap of Controversy; Mayor Rudolph Giuliani Threatens to Cut Off Museum’s Funds Over Dung-Encrusted Icon*, WASH. POST, Sept. 24, 1999 at C01.

⁷² *Id.*

⁷³ Tom Hays, *City Says It Won’t Cut Off Brooklyn Museum’s Capital Funds*, AP NEWSWIRE, Oct. 20, 1999.

the show six hours earlier than planned.⁷⁴ In the first seven hours of opening day, seven thousand people visited the Exhibit.⁷⁵

B. Brooklyn Museum's Argument

In response to the Mayor's threat, the Institute filed an action against the City of New York and Mayor Giuliani, individually and in his official capacity as Mayor of the City of New York.⁷⁶ The Institute sought relief from Mayor Giuliani's determination to punish, sanction, and otherwise retaliate against the Institute as a result of its determination to display the Exhibit.⁷⁷

1. First Amendment Violation

Mayor Giuliani made direct and indirect threats through his Deputy Mayors and the Corporation Counsel of the City, to cut the Museum's funding, terminate its lease, seize the museum, and fire the Institute's Board of Trustees unless it canceled the Exhibit.⁷⁸ According to the Museum, these threats were motivated by and in retaliation and as punishment for the Institute's exercise of rights guaranteed to it by the First and Fourteenth Amendments of the Constitution of the United States.⁷⁹ "Although the City may generally choose to fund museums as it sees fit, it may not make

⁷⁴ Paula Span, *Museum Draws Crowds as Battle Over Art Exhibit Intensifies*, WASH. POST, Oct. 3, 1999 at A02.

⁷⁵ *Id.*

⁷⁶ The Institute seeks a declaratory judgement, injunctive relief, damages and other relief arising under the First and Fourteenth Amendments to the United States Constitution, Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, as amended 42 U.S.C. § 1983, and the Constitution and laws of the State of New York. Complaint for Plaintiff at 3, Brooklyn Institute of Arts and Sciences, 64 F. Supp. 2d 184.

⁷⁷ *Id.*

⁷⁸ *Id.* at 3.

⁷⁹ *Id.*

funding decisions for the purpose of punishing a museum's constitutionally protected expression."⁸⁰

The Institute claimed that the City was liable for Giuliani's conduct because he is the highest executive officer in performance of a city function, and, as such, his conduct establishes a City policy.⁸¹ The Institute also argued that it will be irreparably harmed and that there is no adequate remedy at law.⁸² The Institute also sought punitive damages against Mayor Giuliani because "he has acted maliciously and with intent to violate or with reckless or callous disregard for plaintiff's rights under the First Amendment..., as made applicable to the States by the Fourteenth Amendment of the Constitution of the United States."⁸³

2. *Equal Protection Claim*

The Institute claimed the actions of the City and Mayor Giuliani targeted the Museum for selective treatment compared to other New York City museums that are similarly situated.⁸⁴ The selective treatment was based on an impermissible consideration, namely the intent to punish the institute's exercise of its constitutional rights to free speech, and the actions violate the Equal Protection Clause of the Fourteenth Amendment.⁸⁵

80 Complaint for Plaintiff at 3, *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F. Supp.2d 184 (E.D.N.Y. 1999) (No. 99 CV 6071).

81 Brief for Plaintiffs at 19, *Brooklyn Institute*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (No. 99 CV 6071).

82. Brief for Plaintiffs at 19, *Brooklyn Institute*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (No. 99 CV 6071). "Mayor Giuliani, in threatening to penalize the museum, acted under color of the laws, statutes, ordinances, regulations, customs, and usages of the City of New York and the State of New York and in his official capacity pursuant to authority delegated to him by the City of New York." *Id.*

83 Brief for Plaintiffs at 20, *Brooklyn Institute*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (No. 99 CV 6071).

84 Brief for Plaintiffs at 21, *Brooklyn Institute*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (No. 99 CV 6071).

85 Brief for Plaintiffs at 21, *Brooklyn Institute*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (No. 99 CV 6071).

3. Violations of Separation of Powers under the New York State Constitution and New York City Charter

The City and Giuliani refused to release funds to the Institute that had been appropriated to it by the City Council.⁸⁶ The Institute claimed that Mayor Giuliani acted beyond the scope of his authority, thus, upsetting the separation of powers between the executive and legislative branches of City government.⁸⁷ The City Council is the sole and independent legislative branch of City government “vested with the legislative power of the city.”⁸⁸ The local legislative powers of the City Council may be “diminished, impaired or suspended only by enactment of a statute by the [State] legislature with the approval of the governor”⁸⁹

C. City of New York and Mayor Giuliani’s Argument

In response to the suit filed by the Museum, the City of New York brought an action in New York State Supreme Court, Kings County for ejectment to recover the City-owned property from the Institute. The City claimed that the Institute’s possessory interest had terminated due to the violation of covenants and agreements contained in the lease between the Institute and the City, as well as conditions to the Institute’s continued possession contained in its Act of incorporation.⁹⁰ The City contended that the Institute failed to maintain the Brooklyn Museum according to the true intent and

86 Brief for Plaintiffs at 23, *Brooklyn Institute*, 64 F. Supp. 2d 184.

87 Brief for Plaintiffs at 23, *Brooklyn Institute*, 64 F. Supp. 2d 184. The Institute claimed that the Mayor is the “chief executive officer of the city,” and, therefore, by “(a) cutting, delaying the release of, or impounding the appropriations authorized in the City’s fiscal budget and (b) refusing to implement the terms and conditions related to appropriations authorized by the City Council in the City’s fiscal budget,” he had exceeded the executive branch’s authority. *Id.*

88 Brief for Plaintiffs at 23, *Brooklyn Institute*, 64 F. Supp. 2d 184.

89 Brief for Plaintiffs at 23, *Brooklyn Institute*, 64 F. Supp. 2d 184.

90 Brief for Defendant at 1, *Brooklyn Institute*, 64 F. Supp. 2d 184.

meaning of the Act and Lease Agreement.⁹¹ Therefore, the City concluded the Lease Agreement was forfeited and the land and building should revert back to the City.⁹²

The City's state court ejectment action alleged that the Museum forfeited its right to occupy the premises by violating the Lease, the Contract, and the Museum's enabling legislation by (1) charging an admission fee of \$9.75 for the Exhibit, without the Mayor's approval, (2) violating the Museum's obligation to "educate and enlighten school children and the public,"⁹³ and (3) improperly furthering "the commercial interests of private parties," rather than public purposes.⁹⁴ City officials had also claimed that the Museum's decision to restrict admission of children to the Exhibit violated the terms of the Lease.⁹⁵ The City claimed that the Lease required open and equal access to the Museum by schoolchildren.⁹⁶ During oral arguments on October 8, 1999, the City abandoned all grounds other than its claim that the Institute failed to maintain the Museum in accordance with its Lease.⁹⁷

The Mayor and City claimed that the First Amendment does not prohibit the City from refusing to subsidize art that is offensive and fosters religious intolerance.⁹⁸ The City and the Mayor sought

91 Brief for Defendant at 1, *Brooklyn Institute*, 64 F. Supp. 2d 184.

92 Brief for Defendant at 1, *Brooklyn Institute*, 64 F. Supp. 2d 184.

93 Brief for Defendant at 1, *Brooklyn Institute*, 64 F. Supp. 2d 184. The City contended that the Museum intended to proceed with the Exhibit, which contained inappropriate, "sensational" matter "offensive to significant segments of the public." *Id.*

94 Brief for Defendant at 1, *Brooklyn Institute*, 64 F. Supp. 2d 184. The City contended the works in the Exhibit came from the private collection of Charles Saatchi, a client of Christie's auction house, which also supported the Exhibit financially. *Id.*

95 *Brooklyn Institute*, 64 F. Supp. 2d at 191. Two days before the City initiated its ejectment action, the Museum Board responded to the complaint by rescinding the requirement that children under seventeen be accompanied by an adult. Instead, it posted warning notices describing the controversial nature of the Exhibit. *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

dismissal of this action insofar as it sought injunctive or declaratory relief, in deference to a state court ejectment action.⁹⁹

D. The District Court Opinion

1. Abstention: The Motion to Dismiss

The court quickly ruled on the jurisdictional matter and denied the City's motion for dismissal of this action in deference to a state court ejectment action.¹⁰⁰ It stated that "Federal courts have the unflagging obligation to adjudicate cases brought within their jurisdiction. It is now black-letter law that abstention from the exercise of federal jurisdiction is the narrow exception, not the rule."¹⁰¹ The court also stated that the "City cannot oust the federal courts of jurisdiction over a fundamental First Amendment dispute by asserting in state court a landlord-tenant issue."¹⁰² The importance of this litigation arises from the First Amendment issue involved and it is for that reason that the federal interests are supreme and the federal courts should not be ousted of jurisdiction.¹⁰³ The court then turned to the First Amendment issue.

99 *Brooklyn Institute*, 64 F. Supp. 2d at 192. The City recognized that a damages claim cannot be dismissed under abstention principles, and also requested that the court stay a determination of damages claim in deference to the state court ejectment action. *Id.* See also *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

100 *Brooklyn Institute*, 64 F. Supp. 2d at 192..

101 *Id.* (quoting *Cecos International, Inc. v. Jorling*, 895 F.2d 66, 70 (2d Cir. 1990)).

102 *Id.* at 193. To begin with, there was no ongoing state proceeding at the time the Museum brought its federal suit. "A federal court need not stay its jurisdictional hand when there is no state action pending at the time the federal suit is filed, even if there is a substantial likelihood that a state proceeding will be instituted in the future to vindicate the state's interests." *Id.* (quoting *Cecos International*, 895 F.2d at 72).

103 *Brooklyn Institute*, 64 F. Supp. 2d at 193.

2. Preliminary Injunction Requirements

The court began by discussing the requirements for a preliminary injunction. For the Museum to obtain a preliminary injunction, it must demonstrate (1) irreparable harm and (2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground of litigation and a balance of hardships tipping decidedly in its favor.¹⁰⁴

a. Irreparable Injury

The court held the Museum met its burden establishing irreparable harm, stating the Museum suffered and would continue to suffer irreparable harm because “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”¹⁰⁵ The court also noted that for a museum of that magnitude, planning for a move would be a monumental burden.¹⁰⁶

The court based its decision in part on the Mayor and the City’s ongoing effort to coerce the Museum to relinquish its First Amendment rights.¹⁰⁷ In the opinion, the court noted the Mayor’s statement on September 24 that “since they [the Museum Board members] seem to have no compunction about putting their hands in the taxpayers’ pockets ... and throwing dung on important religious symbols, I’m not going to have any compunction about trying to put them out of business, meaning the Board.”¹⁰⁸ The

¹⁰⁴ Time Warner Cable of New York City v. Bloomberg L.P., 118 F.3d 917, 923 (2nd Cir. 1997).

¹⁰⁵ Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion). The City and the Mayor argued that the Museum had not shown that the withholding of funding prevented it from showing the Exhibit, nor that the loss of its maintenance and operating subsidy will force imminent closure of the Museum. *Brooklyn Institute*, 64 F. Supp. 2d at 192.

¹⁰⁶ *Id.* Not only did the City cut off appropriated funding, but it also has sued in state court to evict the Museum from property that it had occupied for over one hundred years. *Id.*

¹⁰⁷ *Id.* at 196.

¹⁰⁸ *Id.*

court held the Museum established a showing of irreparable injury sufficient to warrant a preliminary injunction.¹⁰⁹

b. The Museum's Likelihood of Success on its First Amendment Claim

Further, the court found the Museum would likely succeed on the merits of its First Amendment claim.¹¹⁰ The District Court reasoned that the Supreme Court has made it clear that although the government is under no obligation to provide various kinds of benefits, it may not deny them if the reason for the denial required a choice between exercising First Amendment rights and obtaining the benefit.¹¹¹ The Mayor and City threatened to withhold an already appropriated general operating subsidy from the Museum, which it had received for over one hundred years, if the Museum did not cancel the Exhibit. When the Museum resisted, the City and Giuliani withheld the funding and filed a claim to eject the Museum from its City-owned building.¹¹² The court concluded that the City and Giuliani discriminated invidiously in the museum's subsidies in such a way as to "aim at the suppression of dangerous ideas."¹¹³

The initial ejectment suit claimed the Museum violated its Lease and Contract.¹¹⁴ However, the City and Giuliani admitted that the suit's purpose was directly related to the content and particular viewpoints expressed in the Exhibit, causing the court to state that "[t]here can be no greater showing of a First Amendment violation."¹¹⁵ The court found that where there is a denial of a benefit, subsidy or contract that is motivated by a desire to

109 *Id.*

110 *Brooklyn Institute*, 64 F. Supp.2d at 196

111 *Id.* 'See *supra.*, Section III, National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

112 *Brooklyn Institute*, 64 F. Supp. 2d at 196.

113 *Id.* See *Perry*, 408 U.S. at 597.

114 *Brooklyn Institute*, 64 F. Supp. 2d at 200.

115 *Id.*

suppress speech in violation of the First Amendment, that denial will be enjoined.¹¹⁶

The court further stated that taxpayers were not being required to “support” a particular viewpoint, clarifying the distinction between requiring taxpayers to support a particular viewpoint, which the court determined was not involved here, and barring government officials from invidiously discriminating against ideas they find offensive.¹¹⁷ The court pointed out that the Museum did not challenge the principle that the government, through its funding, may choose to champion a viewpoint on a matter of public concern without being required to give equal time to an opposing view.¹¹⁸

The Mayor and the City relied on *Rust v. Sullivan*,¹¹⁹ in which the plaintiffs brought a facial challenge to conditions attached by the Department of Health and Human Services to family planning services provided under Title X of the Public Service Act.¹²⁰ The Act provided that no Title X funds “shall be used in programs where abortion is a method of family planning.”¹²¹ The Court held

116 *Id.*

117 *Id.* For example, the Supreme Court in *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984), struck down a statutory provision that forbade noncommercial stations that receive a grant from the Corporation of Public Broadcasting to “engage in editorializing.” The Court rejected the language that this provision could be defended because it was “intended to prevent the use of taxpayer moneys to promote private views with which taxpayers may disagree.”

The Court explained that virtually every congressional appropriation will raise some objection by taxpayers. “Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures. Nor can this interest be invoked to justify a congressional decision to suppress speech.” 468 U.S. at 385, n. 16.

118 *Id.* See *Rust v. Sullivan*, 500 U.S. 173 (1991).

119 500 U.S. 173 (1991).

120 *Id.* at 178.

121 *Id.* The regulations attached three principal conditions on the grant of federal funds for Title X projects. First, Title X projects were precluded from “provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning.” *Id.* Second, Title X projects could “not encourage, promote, or advocate abortion as a method of family planning.” *Id.* at 180. Third, the regulations provided that the Title X project must be “physically and financially separate from prohibited abortion activities.” *Id.* The regulations set forth a

that the government “has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another.”¹²² The Court rejected the unconstitutional conditions claim with the observation that Congress “has not denied the right to engage in abortion related activities [but] merely refused to fund such activities out of the public” funds.¹²³

In *Brooklyn Institute*, the court held that the doctrine of *Rust v. Sullivan*, upon which the defendants relied, had no relevance in the case.¹²⁴ That is, the Mayor and the City claimed they were permitted to foster values, such as respect for the most dearly-held beliefs of others and the lack of vulgarity in art, by withholding funds from the Museum.¹²⁵ The court stated that “the end which officials may foster by persuasion and example is not in question,” but rather the issue was the means the government used to achieve those ends.¹²⁶

The City and Mayor Giuliani argued there would be no limit on what the public was required to support in the name of the First Amendment if they were not allowed to withhold city funding

nonexclusive list of factors to determine whether the separateness requirement had been met. *Rust*, 500 U.S. at 180-81.

122 *Id.* at 193.

123 *Id.* at 198.

124 *Brooklyn Institute*, 64 F. Supp. 2d at 200.

125 *Id.*

126 *Id.* Justice Jackson described in *West Virginia State Board of Education v. Barnette*, in striking a compulsory flag statute and pledge of allegiance statute:

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights, it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end. 319 U.S. 624, 636-37 (1943).

from the Museum.¹²⁷ The court pointed out that the Museum did not claim the City was obligated to provide funding for the Exhibit.¹²⁸ Instead, the court framed the issue stating it was

not whether the City could have been required to provide funding for the Sensation Exhibit, but whether the Museum, having been allocated a general operating subsidy, can now be penalized with the loss of the subsidy, and ejection from a City-owned building, because of the perceived viewpoint of the works in the Exhibit.¹²⁹

In addition, the City and the Mayor claimed that they could avoid injunction based upon the First Amendment because the showing of the Exhibit violated the Museum's statutory purposes and the terms of its Lease and Contract with the City.¹³⁰ The defendants claimed that the withholding of the funding was an effort to vindicate the City's contractual rights.¹³¹ The court found this assertion pretextual.¹³² "Whether the art shown is perceived as offensive or respectful, vulgar or banal, 'good' art or 'bad' art, the Mayor and the City offer no basis for the court to conclude that the Exhibit falls outside the broad parameters of the enabling legislation."¹³³ In addition, the court noted there was no basis for the City's accusation that the legislation described the purposes of the Institute to include "the establishment and maintenance of

127 *Brooklyn Institute*, 64 F. Supp. 2d at 201. The City and the Mayor even claimed that if the court enjoined the withholding of its subsidy, the Museum would be free, under the protection of the First Amendment, to transform itself into a pornography museum. *Id.* The court replied that this assertion was "absurd" and stated that if the Museum sold its collections and became a pornography museum, then there would be vastly different facts and situations than in the case at bar. *Id.*

128 *Id.* The City had not in fact provided the funding, some two million dollars, to cover the various expenses involved in presenting the Exhibit. *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.* at 202.

museums and libraries of art and science” for the provision of “popular instruction and enjoyment.”¹³⁴ There was also no language in the Lease of Contract that gave the Mayor or the City the right to veto works chosen for exhibition by the Museum.¹³⁵ The Contract provided that the City make maintenance payments to the Museum, without stating any conditions regarding the content of the exhibitions.¹³⁶

Finally, the court addressed the Mayor and the City’s argument that they had a “duty” to withdraw support for the Museum because it exhibited art that was offensive and desecrated religion in a public building.¹³⁷ The court cited *Rosenberger v. Rectors and Visitors of the University of Virginia*,¹³⁸ stating that “[i]t is important to note the requirement that the government remain neutral with regard to religious expression, whether ‘it manifest a religious view, an antireligious view, or neither.’”¹³⁹ The court noted that the Museum exhibits art from all over the world, which contain many reverential depictions of the Madonna as well as other religious paintings and objects. The court held that “[n]o objective observer could conclude that the Museum’s showing of the work of an individual artist, which is viewed by some as sacrilegious, constitutes endorsement of anti-religious views by the City or the Mayor, any more than the Museum’s showing of religiously reverential works constitutes an endorsement by them

134 *Brooklyn Institute*, 64 F. Supp. 2d at 203. The Exhibit, despite its controversial nature, had been recognized by other prominent museums as worthy of display and some of the artists have been recognized with prestigious awards. The Museum had also implemented several educational programs in conjunction with the Exhibit itself, including lectures, films and panel discussions with critics and scholars. It was also evidenced that the Museum was not limited to showing works suitable for children due to the existence of the new independent Brooklyn’s Children’s Museum, which is designated to cater to the needs of children. *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 515 U.S. 819, 841 (1995).

139 *Brooklyn Institute*, 64 F. Supp. 2d at 204. In *Rosenberger*, the Supreme Court held unconstitutional a state university’s denial of funding to a student journal solely because the journal espoused a Christian viewpoint. *Id.*

of religion.”¹⁴⁰ The court stated that if anything, it was the Mayor and the City who had threatened the neutrality of the government in the sphere of religion.¹⁴¹

III. ANALYSIS

The District Court correctly decided the First Amendment issue in *Brooklyn Institute of Arts and Sciences v. The City of New York* because the Museum’s decision to mount the Exhibit, regardless of whether it was found “sick” and “offensive,” is constitutionally protected. The court held that the state court ejectment action was conceived and initiated to pressure the Museum to cancel the Exhibit or remove specific objectionable work.¹⁴² The record demonstrated that the Mayor and other senior City officials were offended by the content of the Exhibit, as they stated from the beginning, and then sought a basis to justify their determination to compel the Museum to remove certain offending works from the Exhibit, or cancel the Exhibit, or failing that, to seek replacement of its Board.¹⁴³

The court in *Brooklyn Institute* relied on two cases in making its decision. In the first of these, *Cuban Museum of Arts and Sciences v. City of Miami*,¹⁴⁴ the court held that the refusal to renew the Cuban Museum’s lease was motivated by the City’s opposition to the Museum’s exhibit.¹⁴⁵ In the second case, *National Endowment of the Arts v. Finley*,¹⁴⁶ The United States Supreme Court held that

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Brooklyn Institute*, 64 F. Supp. 2d 184, 204 (E.D.N.Y. 1999).

¹⁴³ *Id.* The City’s rapid abandonment of two of the three grounds of its action supported this conclusion. *Id.*

¹⁴⁴ 766 F. Supp. 1121 (S.D.Fla. 1991). See also Marielise Kelly, Comment, *Constitutional Law-First Amendment- Artwork From The “Enemy” Nation: Informational Material Under The Trading With The Enemy Act, A Relic of Perceived Communist Threat*, *Cernuda v. Heavey*, 720 F. Supp. 1544 (S.D. FLA. 1989), 14 Suffolk Transnat’l L. J. 567 (1991) (giving a more complete discussion of *Cuban Museum*).

¹⁴⁵ *Id.*

¹⁴⁶ 524 U.S. 569 (1998).

because the National Endowment of the Arts (“NEA”) had limited funding, any content-based considerations taken into account in the grant-making process were consequences of the nature of arts funding.¹⁴⁷ Based on these two cases, the United States District Court for the Eastern District of New York correctly held that Mayor Giuliani and the City of New York’s eviction action, which was motivated by an opposition to the Exhibit, violated protections afforded to the Brooklyn Museum under the First Amendment.¹⁴⁸

A. Cuban Museum of Arts and Sciences v. City of Miami

As the district court noted, the case most analogous to *Brooklyn Institute* is *Cuban Museum of Arts and Culture, Inc. v. City of Miami*, in which the City of Miami was enjoined for refusing to renew an expired lease with the Cuban Museum.¹⁴⁹ The court held that the City of Miami violated the Cuban Museum’s First Amendment rights, since the refusal to renew its lease was motivated by the City’s opposition to the Museum’s exhibit of Cuban artists who were either living in Cuba or had not denounced Fidel Castro.¹⁵⁰

The Cuban Museum made plans to hold its second art auction to raise funds for the Museum.¹⁵¹ The Museum Committee selected a number of works created either by artists who had not renounced the Castro regime or by artists who had continued to live in a communist regime.¹⁵² The controversial nature of the artists producing the works created a hostile environment for the

¹⁴⁷ *Id.* at 585.

¹⁴⁸ *Brooklyn Institute*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

¹⁴⁹ *Id.* at 196.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

auction.¹⁵³ In the aftermath of the auction, attempts were made to have certain directors of the Cuban Museum resign.¹⁵⁴

The controversy surrounding the Museum was brought to the floor of the Miami City Commission.¹⁵⁵ A substantial portion of the local Cuban community, including various prominent local figures, expressed discontent with the Museum board and asked the City to find a way to oust the Museum's administration.¹⁵⁶

Allegations were made that the Museum had instituted a two dollar admission fee, which violated the lease and the City's intention that admission be free to the public.¹⁵⁷ The City Commission passed a motion resolving not to renew the lease agreement with the present administration of the Cuban Museum.¹⁵⁸ The Commission wanted "to assure that the more popular and less controversial group, which allegedly embodied the true spirit and viewpoint of the Cuban Museum and the Cuban exile community, would have a forum in which to serve the community and express its views on the history, art, and culture of the Cuban people."¹⁵⁹

Following the Commission meeting, the Museum filed an action and the City began eviction proceedings in state court.¹⁶⁰ The Museum asserted that the decision to exhibit art "created by Cuban artists who were living in Cuba or who had not denounced Fidel Castro" was constitutionally protected conduct. The City argued

153 *Cuban Museum of Arts and Culture*, 766 F. Supp. 1121, 1122 (S.D. Fla. 1991). "One of the controversial paintings was purchased at the auction and burned in the streets outside the Museum as a small crowd chanted its opposition to the controversial artists." *Id.* at 1122.

154 *Id.* Although most of the attempts were peaceful, a bomb was exploded under the automobile of Teresa Saldise, an attorney serving as a director and vice president of the Cuban Museum. *Id.*

155 *Cuban Museum of Arts and Culture*, 766 F. Supp. at 1123.

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.* at 1124.

160 *Cuban Museum of Arts and Culture*, 766 F. Supp. at 1123.

that the exhibition of these works were no more than “prohibited contraband.”¹⁶¹

The court held that the decision to exhibit the art, regardless of the political beliefs and ideology of the artist, was constitutionally protected.¹⁶² Having found that the Museum’s actions were constitutionally protected expression, the court analyzed how the Museum’s exercise of its First Amendment rights affected the City’s decision to deny them the continued use of the Museum building and the premises.¹⁶³

The City argued that the City of Miami Charter required the City to deny the Cuban Museum the continued possession of the property.¹⁶⁴ The court concluded that the assertion of the City Charter was no more than a pretext.¹⁶⁵ The City regularly allowed others to use the City-owned property without formal leases and without the use of the procedures in the charter. Evidence suggested that the City would indeed have allowed the Cuban Museum to remain on the city-owned property if some sort of reconciliation had occurred whereby the Cuban Museum and its directors could have reflected the principles of the more “popular” group.¹⁶⁶ Therefore, the court held that “the City of Miami’s actions were indeed motivated by the Museum’s exercise of their constitutional rights, and that the City would not have acted to

161 *Id.* at 1125. The City based its finding on the Trading with the Enemy Act, specifically 50 U.S.C. App. § 5 and the regulations promulgated thereunder. *Id.* See 50 App. U.S.C. § 5 (West 1990; Supp. 1999).

162 *Id.* at 1126.

163 *Id.* The City asserted that the museum’s exercise of its First Amendment rights was not a substantial motivating factor behind the City Commission’s decision. The court was not convinced that the City’s grounds for eviction were concerns with the two dollar admission charges and the museum’s operational hours. *Id.*

164 *Cuban Museum of Arts and Culture*, 766 F. Supp. at 1123. The Cuban Museum of Arts and Culture, Inc., a non-profit corporation, was formed under the laws of the State of Florida. In 1981, the museum entered into an agreement to lease a building from the City of Miami. After the lease expired, the City renewed it for two additional three-year periods without any concern or reservation. *Id.*

165 *Id.*

166 *Id.*

deny the Museum continued use and possession of the premises but for the Museum's controversial exercise of its First Amendment rights."¹⁶⁷

Brooklyn Institute involved the very safeguards that the First Amendment was meant to provide. The First Amendment seeks to protect freedom of expression, "whether those expressing ideas are members of a popular majority or members of an unpopular minority."¹⁶⁸ Relying on *The Cuban Museum of Arts and Culture* case, the court in *Brooklyn Institute* regarded Giuliani's eviction action as a pretext.¹⁶⁹ The City's and Giuliani's allegations that the Brooklyn Museum's admission fee violated the Lease and the City's intention that the Museum be free to the public were analogous to claims asserted in *Cuban Museum*.¹⁷⁰ The City and Giuliani claimed that by staging the Exhibition of "sick stuff,"¹⁷¹ the Brooklyn Museum violated a provision of the lease from 1893 which required it to "enlighten, educate, and provide enjoyment."¹⁷² Whether or not Giuliani considered the Exhibit "sick stuff," the Brooklyn Museum's decision to exhibit the art was constitutionally protected.¹⁷³ Giuliani and the City would not have acted to deny the Brooklyn Museum continued use and possession

167 *Id.* at 1127-28.

168 *Cuban Museum of Arts and Culture*, 766 F. Supp. at 1132.

169 *Brooklyn Institute*, 64 F. Supp.2d at 196

170 Brief for Defendant at 7, *Brooklyn Institute*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999) (No. 99 CV 6071).

171 *Brooklyn Institute*, 64 F. Supp. 2d at 190.

172 *Id.*

173 *Id.* There are certain limited classes of speech which may be prohibited or punished by the state that are consistent with the First Amendment: (1) obscene speech; (2) libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of a crime, complicity by encouragement, conspiracy, and the like; (3) speech or writing used as an integral part of conduct in violation of a valid criminal statute; and (4) speech which is directed to inciting or producing imminent lawless action, and which is likely to incite or produce such action. *Byers v. Edmondson*, 712 So.2d 681, 689 (1998). Giuliani's classification of the exhibit as "sick" does not fall under any of these categories, therefore, the exhibit constitutes protected expression. *See also* Jeffery Haag, Comment, *If Words Could Kill: Rethinking For Media Speech That Incites Danger Or Illegal Activity*, 20 Tex. Tech. L. Rev. 1421 (1999) (discussing limited classes of speech).

of the premises but for the Brooklyn Museum's controversial exercise of its First Amendment rights. Statements by Giuliani suggest that he and the City would have allowed the Brooklyn Museum to remain on the city-owned property if the Exhibit were canceled. Giuliani stated that he would cut city funding "until the director comes to his senses and realizes that if you are a government subsidized enterprise, then you can't do things that desecrate the most personal and deeply held views of people in society."¹⁷⁴ It is therefore apparent that the City and Giuliani's actions to evict the Brooklyn Museum were indeed motivated by the Museum's exercise of its constitutional rights.

In both *Cuban Museum* and *Brooklyn Institute*, City officials found the content of the exhibits "offensive" and attempted to stop the exhibition by filing an eviction action.¹⁷⁵ In both cases, the courts decided that the respective City's actions were a pretext and motivated by the museums' exercise of their constitutional rights.

B. National Endowment For The Arts v. Finley

To support its eviction action, Giuliani and the City attempted to rely on *National Endowment for The Arts v. Finley*,¹⁷⁶ which is the most recent decision regarding the issue of funding. The National Endowment for the Arts ("NEA") awards financial grants to support the arts.¹⁷⁷ Applications for grants are initially reviewed

174 Paula Span, *New York Art Show in a Heap of Controversy; Mayor Rudolph Giuliani Threatens to Cut Off Museum's Funds Over Dung-Encrusted Icon*, WASH. POST, September 24, 1999.

175 *Brooklyn Institute*, 64 F. Supp.2d at 194.

176 524 U.S. 569 (1998). For a more comprehensive discussion, see Karen M. Kowalski, Notes & Comments, *National Endowment For Arts v. Finley: Painting A Grim Picture For Federally Funded Art*, 49 DePaul L. Rev. 217 (1999).

177 *Id.* The National Foundation of the Arts & Humanities Act vests the NEA with "substantial discretion to award grants; it identifies only the broadest funding priorities, including 'artistic and cultural significance, giving emphasis to American creativity and cultural diversity,' 'professional excellence,' and the encouragement of 'public knowledge, education, understanding, and an appreciation of the arts.'" 20 U.S.C. §954(c)(1)-(10) (West 1990).

by advisory panels, which are comprised of experts in the relevant artistic field.¹⁷⁸ In 1989, Congress, prompted by public controversy over provocative photographs that appeared in two NEA-funded exhibits,¹⁷⁹ inserted amendments into the NEA's reauthorization bill.¹⁸⁰ One of the amendments was Amendment §954 (d)(1) which ensured that "artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the direct beliefs and values of the American public."¹⁸¹ Congress also agreed to create an Independent Commission to review the NEA's grant-making procedures.¹⁸²

The respondents in this case were four performance artists who independently applied for NEA grants before §954 (d)(1) was enacted.¹⁸³ They were denied funding and filed suit, alleging the NEA had violated their First Amendment rights.¹⁸⁴ When §954 (d)(1) was enacted, the artists amended their complaints and challenged the provision as void for vagueness and impermissibly viewpoint based.¹⁸⁵ They argued that the provision rejected any artistic speech that "either fails to respect mainstream values or offends standards of decency," and therefore, was viewpoint discrimination.¹⁸⁶

The NEA argued and the United States Supreme Court held that the provision merely added "considerations" to the grant-making process and the plain text of § 954 (d)(1) did not impose a

178 *Finley*, 524 U.S. at 573.

179 The two provocative works were Robert Maplethorpe's exhibit *The Perfect Moment*, which included homoerotic photographs that Congress considered pornographic, and Andres Serrano's work *Piss Christ*, a photo of a crucifix immersed in urine. *Id.* at 574.

180 *Id.* at 575-577.

181 20 U.S.C. §954 (d)(1) (West Supp. 1999).

182 20 U.S.C. §959 (c)(1)-(2) (West Supp. 1999). The panels are required to reflect "diverse artistic and cultural points of view" and include "wide geographic, ethnic, and minority representation" as well as "lay individuals who are knowledgeable about the arts."

183 *Finley*, 524 U.S. at 577.

184 *Id.*

185 *Id.* at 578.

186 *Id.* at 580.

categorical requirement.¹⁸⁷ The statute advised that the NEA take “decency and respect” into consideration when assessing grant applications.¹⁸⁸ The Court held that because the NEA has limited funding, any content-based considerations that may be taken into account in the grant-making process were consequences of the nature of arts funding.¹⁸⁹ The court further held the provision [did] not preclude awards to projects that might be deemed “indecent” or “disrespectful,” nor place conditions on grants and because the Court did “not perceive a realistic danger” that the provision will be used “to effectively preclude or punish the expression of particular views.”¹⁹⁰ However, the Court noted that “if the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty of disfavored viewpoints, then we confront a different case.”¹⁹¹

The *Brooklyn Institute* court held that the City and Mayor Giuliani’s reliance on *Finley* to support a claim that viewpoint discrimination in arts funding is permissible was misplaced.¹⁹² The court distinguished *Brooklyn Institute* from *Finley* on the grounds that Giuliani and the City of New York were in fact leveraging their power to award subsidies on the basis of disfavored viewpoints.¹⁹³ The Court in *NEA v. Finley* had stated that some content-based restrictions may be taken into account in the grant-making process because of the NEA’s limited funding.¹⁹⁴

187 *Id.*

188 *Finley*, 524 U.S. at 581-82. Educational programs are central to the NEA’s mission. It has well been established that “decency” is a permissible factor where “educational suitability” motivates its considerations. *See Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982).

189 *Finley*, 524 U.S. at 585. The court described the provision’s legislative history, including Congress’ rejection of language that would have prohibited awards of grants that would have the purpose or effect of denigrating people on the basis of race, sex, handicap or national origin. *Id.*

190 *Id.* at 580.

191 *Id.* at 587.

192 *Brooklyn Institute*, 64 F. Supp. 2d at 201.

193 *Id.*

194 *Finley*, 524 U.S. at 569.

Nonetheless, the city funding in *Brooklyn Institute* was an annual allotment not determined on an exhibit-by-exhibit basis.

Giuliani, a Roman Catholic, was offended by a particular work the “Holy Virgin Mary,” which is a collage of pornographic photos adorned with elephant dung. Giuliani on several occasions had described Sensation as “sick” and “disgusting” and an affront to religion that should not receive taxpayer funding.¹⁹⁵ The City of New York and Giuliani leveraged their power to award subsidies based on the disfavored viewpoint that this work is an affront to religion. Their actions were viewpoint discriminatory and, therefore, held to be unconstitutional.¹⁹⁶

C. New York City’s Lack of Deference to First Amendment Protections

From Andres Serrano’s infamous “Piss Christ” to Robert Mapplethorpe’s X-rated photos, the exhibition of the Saatchi Collection was the latest battle in the culture wars. Mayor Giuliani described Chris Ofili’s portrait of the Virgin Mary adorned with elephant dung as offensive and an affront to religion.¹⁹⁷ Offensive art may be highly subjective. A work of art may evoke different reactions from different people. “What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another.”¹⁹⁸ Artist Chris Ofili claimed he did not intend to offend Roman Catholics. He said “Catholics and other offended citizens should understand that the elephant is part of his African heritage and therefore the smearing of elephant dung is rife with meaning.”¹⁹⁹ “There is something incredibly...basic about it,”²⁰⁰

¹⁹⁵ *Brooklyn Institute*, 64 F. Supp. 2d at 184.

¹⁹⁶ *Id.* at 202.

¹⁹⁷ *Id.*

¹⁹⁸ *Hannegan*, 327 U.S. at 157.

¹⁹⁹ Sean Paige and Michael Rust, *Waste & Abuse*, WASH. TIMES, Nov. 8, 1999 at 47.

²⁰⁰ Evan Gahr, *Hate Speech...With Tax Support*, WASH. TIMES, Oct. 4, 1999 at A14.

Ofilu explained. "It attracts a multiple [sic] of meaning and interpretation."²⁰¹

American society has permitted content restrictions on speech in a few limited areas which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."²⁰² The government may not regulate use based on hostility or favoritism towards the underlying message expressed.²⁰³ The rationale for this rule is that content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."²⁰⁴ "That the state may have denied to protect the sensibilities of the passerby"²⁰⁵ is not a basis for suppressing ideas because anyone who might have been offended could easily have avoided the display.

Whether the pieces in the Saatchi Collection are great works of art is not at issue here, but rather the real issue is whether taxpayer money should be used toward art that some people find offensive. As the Supreme Court stated in *Buckley v. Valeo*, "virtually every congressional appropriation will to some extent involve the use of public money as to which some taxpayers will object Nevertheless, this does not mean that those taxpayers have a Constitutionally protected right to enjoin such expenditures. Nor can this interest be invoked to justify a Congressional decision to

201 *Id.*

202 *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

203 *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 386 (1992) (Minnesota anti-hate-speech law was struck down on the basis that the law was impermissibly content-based since "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses").

204 *Simon & Schuster, Inc. v. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (striking down a "Son of Sam" law requiring an accused or convicted criminal's income from his crime to be deposited in an escrow account and made available to the victims of the crime, as content-based violation of the First Amendment).

205 *Spence v. Washington*, 418 U.S. 405, 412 (1974) (articulating a two-part test for determining whether conduct possesses sufficient "communicative elements" to trigger First Amendment protection. It must both possess (1) an intent to convey a particularized message; and (2) the likelihood must be great that the message would be understood by those who viewed it). *Id.*

suppress speech.”²⁰⁶ The court in *Brooklyn Institute* illustrated the fallacy in Mayor Giuliani and the City’s claim that while the Exhibit can be shown privately, “taxpayers don’t have to pay for it.”²⁰⁷ As the court noted, federal taxpayers in effect pay for the mailing of periodicals that many of them find objectionable, as well as subsidize all manner of views through tax exemptions and deductions given to other taxpayers.²⁰⁸ When a denial of a subsidy or contract is motivated by a desire to suppress speech in violation of the First Amendment, that denial will be enjoined.²⁰⁹

Giuliani’s statement “You don’t have a right to a government subsidy to desecrate someone else’s religion,” is an easily impassioned argument, but it ignores the facts and the law.²¹⁰ The two million dollars that funded the Sensation Exhibit did not come from New York City,²¹¹ and there have been serious allegations of where the funding originated.²¹² The Contract with the Museum called for the City to pay for maintenance; it did not state any conditions regarding the content of the Museum’s artworks.²¹³

The controversy over the Exhibit has a context greater than the debate of whether the government has the right to pull funding from the arts. Giuliani used the Saatchi Exhibit as a pretext to benefit his political agenda. He sought to appeal to the

206 421 U.S. 1 (1976).

207 *Brooklyn Institute*, 64 F. Supp.2d 184, 213 (E.D.N.Y. 1999).

208 *Id.*

209 *Id.*

210 *An Art Lesson For Giuliani*, BOSTON GLOBE, Nov. 3, 1999.

211 *Id.*

212 *Id.* Mayor Giuliani has charged museum executives with conspiring with art collector Charles Saatchi to inflate the value of his works on display. Giuliani cited the promotion of a private collection by a public-funded institution and the partial funding of its New York showing by Christie’s auction house, which he claimed planned to sell Saatchi’s collection, as grounds for the city’s lawsuit against the museum. Saatchi is one of the world’s biggest art collectors of contemporary art. He buys entire exhibitions of young artists at a great discount and then sells them after their prices have appreciated. The exhibit at the Brooklyn Museum was an opportunity to enhance the value of his collections. *An Art Crisis Grows In Brooklyn; Battle Between Mayor and Museum Director Is As Much About Money and Political Ambition As Art*, SAN FRAN. EXAMINER, Dec. 12, 1999.

213 *An Art Lesson For Giuliani*, BOSTON GLOBE, Nov. 3, 1999.

conservative voters with his staunch opposition to the Exhibit. In contrast, the Brooklyn Museum sought to attract a large audience by showing the controversial collection of works. As a result, Charles Saatchi, whose art works were on display, will inevitably enjoy an increase in the value of his collection.

As a practical matter, Giuliani's insistence on the ejectment suit is most puzzling. Recently, trustees had donated millions of dollars for building improvements and the Museum building was remodeled with special climate control and galleries only suitable for a museum.²¹⁴ In addition, the One and a half million artworks on display in the Museum, the second largest collection in the country after the Metropolitan Museum of Art in Manhattan, are all owned by the Museum.²¹⁵ In an effort to score political points, Giuliani put one of the City's treasured museums at risk.²¹⁶

214 David Barstow, *If Mayor Succeeds In Evicting Museum, Art's Fate Is Uncertain*, N.Y. TIMES ABSTRACT, Oct. 21, 1999 AT 1.

215 *Brooklyn Institute*, 64 F. Supp. 2d at 187. The Contract between the Museum and the City unequivocally stated that the City has no ownership rights with respect to any of the collections in the Museum. The contract provides:

that the collections of books and other objects in art and sciences placed in the Museum Building for purposes of exhibition, instruction, or to enable the Brooklyn Institute of Arts and Sciences to carry out its purposes as authorized in its charter, shall continue to be and shall remain absolutely the property of the [Institute], and that neither the [Mayor nor the City of Brooklyn], by reason of said property being placed in said building or continuance therein, have any title, property or interest therein. *Id.*

216 Justifying Giuliani's efforts, Michael D. Hess, the corporation counsel, said the Mayor had no desire to see the collection "scattered about" to other cities. David Barstow, *If Mayor Succeeds In Evicting Museum, Art's Fate Is Uncertain*, N.Y. TIMES NEWS ABSTRACT, Oct. 21, 1999 at 1. He claimed the mayor's intent was to gain leverage over the museum's board, and asserted that if evicted, the board would voluntarily agree to cede ownership of the art to the City. Arnold Lehman, the museum's director, and Robert S. Rubin, its chairman, declined to comment on what would happen if the Museum were evicted. *Id.*

IV. CONCLUSION

The District Court was correct in granting a preliminary injunction in favor of the Museum. The facts and precedent significantly favor the Museum. The Mayor and the City of New York's decision to cut City funding in order to compel the Museum to cancel the Exhibit or to replace the members of the Board of Trustees infringed on the museum's First Amendment guarantees of freedom of expression. Mayor Giuliani and the City's one remaining rationale in the case, namely that by staging the exhibition of "sick stuff," the Museum violated a provision of its lease requiring it to "enlighten, educate and provide enjoyment," was purely pretextual. Giuliani was offended by the Exhibit and attempted to use his power to penalize the Museum for exercising its constitutionally protected rights. His attempt, however, was correctly curtailed by the United States District Court for the Eastern District of New York and the people are once again assured their constitutional right to experience Sensation.

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